HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 039 • 1st SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, May 29, 2012

Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

Tuesday, May 29, 2012

● (1145)

[*English*]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): We'll call the meeting to order. This is meeting number 39 of the Standing Committee on Justice and Human Rights. Pursuant to the order of reference of Wednesday, February 29, 2012, we are studying Bill C-299, an act to amend the Criminal code (kidnapping of young person).

Appearing as a witness before us today is Michael Spratt from the Canadian Civil Liberties Association. Sir, as usual, we have an opportunity for you, if you wish, to make an opening address, and then we'll begin our panel.

Mr. Michael Spratt (Lawyer, Canadian Civil Liberties Association): Thank you very much.

I should first say that it's a pleasure to be here. It's always a pleasure to address the honourable members of the committee.

My name is Michael Spratt. I'm a criminal lawyer. I practise solely criminal law here in Ottawa, Ontario. I'm with the firm Webber Schroeder Goldstein Abergel. I've appeared at all levels of court, representing all types of different offenders and offences.

Today I appear before you as a representative of the Canadian Civil Liberties Association, CCLA, which of course is a national organization comprising thousands of members from all walks of life, not just lawyers.

The CCLA was constituted to promote respect for and observance of fundamental rights, to promote individual freedom, and to protect that freedom from unreasonable invasion. It's our position that any policy or any legislation must be the least intrusive possible and must be supported by evidence. To that end, it comes as no surprise that we object to some of the measures in Bill C-299, not because we disagree with the purpose of the bill, but because it employs the failed policy of mandatory minimum sentences that simply will not accomplish the goals of the bill. Mandatory minimum sentences are not supported by the evidence, and they don't come close to effecting the very policy goals they seek to implement.

Our first main concern with the use of mandatory minimum sentences won't be a surprise. We've made submissions, and other groups have made submissions, on mandatory minimum sentences. Our concern is that they run the risk of being unconstitutional and of raising situations that offend the charter.

Of course, sentences must be carefully tailored to both the offender and the offence. This is an historic and long-standing principle of our common law criminal justice system. Mandatory minimum sentences undermine this principle due to their inflexible nature. Injustice may not be the intent of legislation that employs mandatory minimum sentences, but it is quite often the result.

Specifically, in looking at this piece of legislation, which deals with kidnapping of children under the age of 16, if one reviews the case law, it becomes quite clear very quickly that in general most sentences imposed are in excess of five years, the minimum sentence called for in this bill. However, the elimination of judicial discretion can leave open reasonable hypothetical cases that may call for a sentence of less than five years. Because of the inflexible nature of mandatory minimum sentences, our justice system won't be afforded the discretion to deal with those cases.

To keep things brief now, I'm sure we can have a discussion during the question period about what some of those cases may be, and I'd be happy to engage in that conversation.

The bottom line is that there are no flexibilities in mandatory minimum sentence legislation to deal with any unusual cases or mitigating facts that may call for a sentence that is less than the minimum sentence.

Judges are in the best place to impose just sentences. They, of course, are familiar with the facts, familiar with the offender, familiar with the offence, and familiar with the community in which they sit. In Canada, we are blessed with a well-educated and competent judiciary, a judiciary that is incorruptible. In fact, it is a system we have espoused around the world in helping emerging democracies set up their justice systems.

When we remove discretion from judges, it's not just that it can result in unjust and inflexible sentences. I can speak about some of the practical implications of the removal of that discretion.

The first is that discretion is not really removed from the system; it's just shifted. The discretion is shifted to crown attorneys and police forces. Of course, unlike judicial discretion, this discretion is not reviewable and it's not transparent. And it can result in other problems.

Ironically, the problem that can result is twofold.

First, the shift in discretion can result in, as I said, these non-reviewable, discretion-making decisions that can influence or induce pleas from people who may not be guilty of the charge.

Second, when faced with a mandatory minimum sentence and another part of the Criminal Code that may not have a mandatory minimum sentence, there often is a perverse incentive to resolve the charge based on the section of the code that doesn't have a mandatory minimum.

● (1150)

I say it's ironic because at the same time, mandatory minimum sentences also result in an increased number of trials. If the result is all but guaranteed, if guilt is assured, there is very little incentive to resolve early when you know you're facing a mandatory minimum sentence. This of course increases the drain on our court resources, brings witnesses to court, and, in this case, young witnesses whom we may not wish to go through the process of testifying.

Mandatory minimum sentences also have a disproportionate impact on aboriginal groups, in light of the Supreme Court's decision of Gladue and, recently, Ipeelee.

Most importantly—and I say that we agree with the goals of the legislation but not with the mechanism by which those goals are implemented—the evidence is clear that mandatory minimum sentences do not deter offenders. They do not stop the offence from happening, and they don't afford an increased level of protection.

There is an illogical gap between the purposes and the mechanism, a gap that should be bridged by evidence. In the case of mandatory minimum sentences, that evidence shows the contrary —minimum sentences do not have an effect on deterrence.

I would urge this committee to review all the materials. I can speak to some of the practical implications. I can speak to some of the evidence, but there are others who can speak to the criminological evidence. I would urge this committee to review the November 2010 report of the Canadian Centre for Policy Alternatives.

I would urge this committee to look south of the border. Marc Mauer, the executive director of The Sentencing Project, has testified before committees before. Specifically, I would commend you to his testimony of October 28, 2009, before the Senate committee.

I would ask this committee to reflect on the February 6, 2011, letter that was drafted and signed by over 500 leading voices and experts in this area. That dealt specifically with Bill S-10, but it also touched on the mandatory minimum sentence issue.

We have some very eminent criminologists who are close at hand, Anthony Doob, and the studies and the evidence that he can point the committee to.

The bottom line is that mandatory minimum sentences are not effective. They're a simple way of looking at a complex problem and, in my submission, ultimately a myopic way of looking at that problem. Mandatory minimum sentences, and I'm sure it will be pointed out to me, exist in the code, have been introduced by different governments, but this is not an excuse to continue a failed policy that is not justified on the evidence.

If the intent of this bill is to decrease the kidnapping of young people, to protect young people, the evidence shows that mandatory minimum sentences, I submit, will not accomplish that goal. In turn, they will bring the practical side effects that I can testify about: the increase in court time; the perverse incentives; the shift in discretion from judges to crowns and police; and the elimination of judicial discretion, a pillar of our justice system.

I'll turn the floor over to whoever wants to take the first shot, I guess.

● (1155)

The Chair: Madame Boivin, go ahead.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chair.

Thank you, Mr. Spratt. That is interesting. It is never an easy issue, although the position of the NDP is clear. We have some reservations about mandatory minimum sentences, for the same reasons that you have expressed. But let's be realistic, if we look at section 279 of the Criminal Code, we can see that minimum sentences are included.

I am not sure if you are familiar with section 279 and subsequent sections on kidnapping, human trafficking, hostage taking and abduction. How can we justify that, in a case of child kidnapping, for example, such as the one in Mr. Wilks's bill, a minimum sentence is denied when there is one, for example, for a first offence, when a restricted firearm is used. In that case, it is five years.

Is the kidnapping of a child not sufficient for a minimum sentence? How do you explain the distinction made between those various offences in the Criminal Code?

[*English*]

Mr. Michael Spratt: Let's first be very clear. The sentence of five years for kidnapping a child will in the vast majority of cases be appropriate. If the committee reflects on prior judicial decisions, a sentence of more than five years is very common. Our point is simply that looking at this piece of legislation in isolation, the mandatory minimum sentence has the problems I've outlined. I recognize there are other mandatory minimum sentences in the code, and mandatory minimum sentences in some cases have been found to be constitutional. However, that doesn't remove the problem of the mandatory minimum sentence in this case.

It's our position that if the government wishes to change the law to deviate from one of the historic cornerstones and pillars of our justice system, it should be done based on the evidence. It's the government that wishes to change this law and it's the government that should demonstrate that mandatory minimum sentences will be effective in implementing the desired policy outcome in this piece of legislation.

Yes, kidnapping a child is bad, and, yes, kidnapping with a firearm is bad, but just because that door has been opened, I submit, it doesn't allow mandatory minimum sentences holus-bolus through the door without a careful evaluation to make sure those changes are necessary and indeed will be effective.

[*Translation*]

Ms. Françoise Boivin: If I am not mistaken, the case law talks about sentences between eight to 15 years, aside from rare exceptions that can be easily explained. Am I right in saying that courts tend to opt for the higher sentence? Don't they have a tendency to choose the maximum sentence rather than the so-called minimum sentence that is supposed to have a deterrent effect?

[*English*]

Mr. Michael Spratt: Certainly the case law demonstrates that what some of us call the tariff for these offences is very high. Having a mandatory minimum sentence won't affect those sentencing decisions. I mean, the mandatory minimum sentence will be a starting point, as the Supreme Court said, for the best offenders and the least serious offences, which the minimum sentence will be applied to. But what we do see as well is—and we can look at cases like Smickle from the Superior Court—that when we're dealing with minimum sentences, there are quite often unique fact scenarios to which the minimum may not be applied. So we have a solution in search of a problem. That is what this legislation may be, I submit, because there isn't a problem. We don't see in the case law blatant bad offenders, who commit this offence, being sentenced very leniently.

[*Translation*]

Ms. Françoise Boivin: I would like to talk about an issue that has been bothering me since we started studying this bill. For example, let's look at subsection 279(1.1) that deals with kidnapping. A little further, it lists offences related to the kidnapping of a person under the age of 16 years, for example. I feel there is a lot of room for games between the Crown and the defence, in order to avoid enforcing the bill if it were passed as written.

Am I right? There is some confusion with this provision.

● (1200)

[*English*]

Mr. Michael Spratt: Maybe this was a wrong assumption on my part. I was under the impression that there might be an amendment contemplated already to this bill to exclude parents and perhaps other relations of the child, in order to avoid a conflict with some of the other sections.

We could have an interesting discussion about how broad that sort of exclusion should be—whether it would cover just parents, grandparents, step-parents, or just people *in loco parentis*. There could be conflicts between this section and the other sections of the bill. That concern could be somewhat mitigated if contemplated amendments are made. What is clear is that one could fall under the prior sections, and it could fall under this section. Crown attorneys across Canada are honourable. They do their job very well, and I count many of them as friends of mine. I have the utmost respect for them.

That leads to this problem about the shift in discretion. When the crown attorney is confronted with a mandatory minimum sentence that isn't appropriate, with an accused that can't afford to mount a lengthy and expensive constitutional challenge, there is an incentive for the crown attorney to use her prosecutorial discretion to avoid what could be a very unjust result. Of course, that's done behind closed doors. It's not reviewable. It's not transparent. Reasons aren't provided, and it doesn't give the appearance of justice being done. There are often successful constitutional challenges to the legislation, which really should be avoided. They're expensive, and they provide uncertainty in the system. Through the Criminal Code, we should be looking to avoid uncertainty.

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler (Mount Royal, Lib.): I'm going to try to ask some questions of focus on the point you made about an evidence-based approach. Some of these questions may be inferentially answered by what you said, but I'm posing them from an evidentiary point of view.

Is there any evidence that judges give light sentences in cases of kidnapping, for example?

Mr. Michael Spratt: Not that I've seen.

Hon. Irwin Cotler: Is there any evidence to suggest that if this law had been enacted, let's say, a decade ago that fewer children would have been kidnapped this year?

Mr. Michael Spratt: No, Anthony Doob on the university website has a great summary of criminological studies, which comes out on a quarterly basis. The preponderance of the evidence demonstrates that mandatory minimum sentences don't have any effect on deterrence.

Hon. Irwin Cotler: I would assume, therefore, that there is no evidence to suggest that the adoption of this law with a mandatory minimum would deter or reduce the incidence of kidnapping.

Mr. Michael Spratt: Not from the research that I've seen.

Hon. Irwin Cotler: Why might someone be prosecuted under the offence of abduction rather than kidnapping? Would the changes in this legislation, particularly that of the mandatory minimum, give rise to a lesser charge being pursued more often?

Mr. Michael Spratt: I think so. We can see this in some of the other offences that have minimum sentences. Also, the offence can relate to more than one section of the Criminal Code. When you have a mandatory minimum sentence and an offence that doesn't have a mandatory minimum sentence, there is often a great deal of negotiation about which charge the crown should proceed on. That's informed by the facts of the case and by prosecutorial discretion. It may in some circumstances reduce the number of kidnapping convictions and result in more convictions for abduction or some other offence such as forcible confinement or assault.

It's not going to affect the serious cases, the cases that call for more than five years. It will affect cases that are borderline, that may not call for five years, that contain extenuating circumstances, either in the offence or the offender.

● (1205)

Hon. Irwin Cotler: Is there any evidence that suggests that the kidnapping of young persons is not adequately denounced presently under the Criminal Code?

Mr. Michael Spratt: No, not that I've seen.

Hon. Irwin Cotler: Because you did make some reference to this in your closing comments, I'd ask you, does the legislation effectively or properly address the distinction that should be made between when the offender is a family relation or when the offender is a stranger?

Mr. Michael Spratt: Currently, no. I understand the intent is to apply only to stranger abductions, which would be an interesting point to look at, the deterrent effect of a minimum sentence as it relates to a family member and to a stranger. It might provide actually less deterrent effect when you're dealing with a stranger abduction. But a lot will turn on how broad or narrow that exception is.

Of course, some of the defences that apply to the other sections of the Criminal Code, the sort of best interests of the child exceptions.... It's unclear if they would apply to this as it's currently drafted.

Hon. Irwin Cotler: Is there any evidence to suggest that the age of 16 is the appropriate point of distinction? Would it maybe be preferable to take into account something like the term “age” or “vulnerability”, rather than a specific number, like 16?

Mr. Michael Spratt: A specific number has some advantages because it's less amorphous than a term like “vulnerable” or relying on some other qualitative factors. But it appears to be completely arbitrary in terms of an age. There is nothing of great import about the age of 16, except I suppose that historically you get your driver's licence at 16. I don't think you can do that anymore anyway.

This is throughout the Criminal Code. We see the age of 14, we see the age of 16, and we see the age when you move from the YCJA to adult sentences. I don't know if there are some evidence-based reasons why 16 is the age, or if there is some problem in the current case law—I didn't see any—that has that age of 16, or if it is just mirroring what is in the Criminal Code already.

The Chair: Thank you.

Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you for testifying today.

I want to talk to you about the issue of the constitutionality of the minimum mandatory sentences. They're not new to the Criminal Code, obviously. Certainly there is a mandatory minimum for first-degree murder that's been there for some time. Is it your view that that is anti-constitutional?

Mr. Michael Spratt: The mandatory minimum sentence for first-degree murder?

Mr. Robert Goguen: Yes.

Mr. Michael Spratt: No, it's not. There are many minimum sentences that aren't unconstitutional. That's a separate question about whether it's good policy or effective policy.

Mr. Robert Goguen: Okay.

I want to direct your attention to something. Justice Major testified here some few weeks ago and we asked him about the possibility of a mandatory minimum for this offence surviving where it was quite a heinous crime, given that the children are vulnerable and they're being abducted. It was his position that it would sustain a constitutional challenge.

Mr. Michael Spratt: Probably in a very heinous case, where the case law already demonstrates that sentences are greater than five years...in that case it may very well survive a constitutional challenge.

Where the legislation on minimum sentences runs into problems is for cases that may have mitigating factors, because mandatory minimum sentences, of course, are a sort of one-size-fits-all solution, ignoring the reality that offenders and offences can be very different.

There is a presumption that minimum sentences, when they're passed, contemplate all cases, the best and the worst. Of course, even the wisest of men can't see all ends. So there will be cases that attract scrutiny. Everyone is quite aware of the case of Smickle, involving guns. There are cases that could attract constitutional scrutiny.

● (1210)

Mr. Robert Goguen: Mr. Justice Major seemed to think this one would.

Obviously, there is a garden variety of Criminal Code offences, many of which are far less serious than this one, and they don't all have mandatory minimum sentences. But I trust you'd agree that it's our position, as parliamentarians, to set a scale of what is a maximum, and in some instances a minimum, to give some guideline to what is the most heinous and less acceptable conduct in the Criminal Code, because it's all about public order.

Mr. Michael Spratt: That's sort of the point. It may be about public order and public perception, but quite unfortunately the evidence shows that mandatory minimum sentences don't deter; they don't prevent these crimes. If one ignores that evidence and one ignores the potential detrimental consequences of mandatory minimum sentences, and one ignores the fact that there really is no problem here because sentences to a large extent are greater than five years....

I should say that we're blessed with a great appellate system, a great review system. As well, we have a state, unlike some countries, that is well funded and is very competent and is able to review decisions that are incorrect. So if there is an improper use of judicial discretion, if there are facts that aren't taken into account, there is a review mechanism. We don't need, I submit, mandatory minimum sentences when the utility behind them simply isn't there and they run contrary to some of the fundamental principles of our justice system.

Mr. Robert Goguen: Which ones would those be, given that we seem to believe this would survive constitutional scrutiny?

Mr. Michael Spratt: The principle I'm speaking of is judicial discretion. For a judge who hears the facts of the case, to impose a just and reasonable sentence, given the offender's personal circumstances, given the offence type and the circumstances of the offence...a minimum sentence removes that discretion. There are many cases in which it could result in unjust results should the minimum sentence be passed.

If there were a demonstrated link to show that mandatory minimum sentences deterred conduct, made us safer, perhaps my position would be different. There simply is not. If there were evidence that judges were getting it wrong, were imposing lenient sentences and there needed to be more denunciation, perhaps my position would be different. Unfortunately, the evidence isn't there to bridge the gap between the purpose of the legislation and the way the legislation tries to implement that goal.

Mr. Robert Goguen: I'm curious about what this evidence is, if you've brought it with you.

Mr. Michael Spratt: I did. It may not be the most useful use of our time to go over it.

I think the starting point is this. When the government wants to change legislation and introduce new legislation, shouldn't it be the government that justifies and demonstrates that utility is there? But if we want to reverse, as we say in the Criminal Code the burden of proof, and shift the onus onto me, we can do that. I can refer you to a number of studies that deal with minimum sentences and their lack of utility, and I'd be happy to do that.

Mr. Robert Goguen: It would be interesting if you could table those.

The Chair: Thank you. Your time is up.

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): Thank you, Mr. Chair.

We'd also love to see the studies. If you could send them on later, or their references, that would be great.

Mr. Michael Spratt: I can forward them to the clerk of the committee, of course.

Mr. Craig Scott: That would be fantastic.

Lest you be under a misimpression about Mr. Justice Major's testimony, I wanted to know whether you would agree with the following distinction he made. He did, indeed, say that he felt this would probably be constitutional, but he made a strong distinction and said as a matter of underlying policy—not just parliamentary policy, but the underlying principles of general criminal law—that he's against mandatory minimums in this case.

Is that your position as well?

Mr. Michael Spratt: That's my position. We only need to look south of the border to see experiences with mandatory minimum sentences in other jurisdictions, but I fully agree with Justice Major on that point.

Mr. Craig Scott: Thank you.

In terms of an example, I had the privilege to talk to Chief Rodney Freeman after the session. We got into an area that none of us really get a chance to cover, so I wanted to see whether you had a view.

With respect to five years, we're looking at a pure kidnapping issue here—not all of the other stuff that we all acknowledge can often happen after a kidnapping—of somebody under 16. Do you think diminished mental capacity of the kidnapper is the kind of factor a judge, in some cases, might want to take into account in figuring out that five years is an excessive sentence?

● (1215)

Mr. Michael Spratt: Yes. I mean, these are factors that we often look at. There can be many factors that operate on an individual accused that fall short of fitness issues or criminal responsibility issues but inform the level of responsibility of that offender. Apart from the offender himself, we can deal with young people, youthful offenders—not young offenders but very youthful offenders—and one can contemplate a number of examples, perhaps, involving those people. For example, a high school prank, where a senior, as part of an initiation, were to take a junior in his car somewhere as a prank. That may technically fall under the kidnapping provision. Or a stepmother or a girlfriend who removes her boyfriend's child from a bad domestic situation has nonetheless made a specific attempt to kidnap and may be captured by this legislation. These are some of the hypotheticals that may arise that relate to both the offender and the offence.

Mr. Craig Scott: Diminished mental capacity is one area we might have to know a lot more about in terms of how it can affect sentencing.

A big concern I have—and I think you've articulated it—is that a mandatory minimum sentencing policy and agenda shows a certain lack of faith in the judicial system as it is operating and in judges' capacity to exercise good-faith judgment in the circumstances of the case, and at some level it reflects a lack of trust in judges. Is that part of what you were arguing earlier?

Mr. Michael Spratt: Yes. There's the difference between what happens in the public perception...and there are also some interesting studies on what informs the public perception of what happens in our justice system. The public may think certain results are unwanted or undesirable, but when properly informed, the public perception often changes.

A minimum sentence is a very blunt way to communicate policy. It's a very blunt way to communicate a position on justice issues. Quite frankly, I think we don't give the public enough credit, and these sorts of policies can be communicated in much more nuanced ways that reflect the evidence and the reality.

Mr. Craig Scott: You've brought up a good point. Chief Freeman in his testimony said that he trusted the system and judges' discretion, but what the public perceives as a lack of consistency is the problem, and the public needs to be reassured. That was one part of his testimony. What you said falls into that.

To me it gets things backwards. If we understand judges are engaging in a balanced and nuanced decision-making process that often requires something less than what a mandatory minimum would suggest, and if the public doesn't quite understand that there are different sentences isn't in and of itself inconsistency...to start from public perception as the basis for public policy strikes me as deeply problematic.

Would you agree that's more or less what you've been arguing too?

Mr. Michael Spratt: Yes. It puts the cart before the horse, or reverses it. It's certainly the CCLA's position that one should start from a principled and evidence-based policy, which the public, if educated about, would support.

The Chair: Ms. Findlay.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Thank you, and thank you for being here today, Mr. Spratt.

I think you'd agree with me, would you not, that the determining of legislation under the Criminal Code is the exclusive jurisdiction of the federal Parliament?

Mr. Michael Spratt: Of course.

Ms. Kerry-Lynne D. Findlay: And judicial discretion, of course, I agree with you, is a fundamental aspect of our justice system and one we're proud of.

However, there are a lot of maximum penalties laid out in the Criminal Code. Would you have the same view of maximum penalties as you do of minimum penalties, that this is not, from a policy point of view, something Parliament should set?

Mr. Michael Spratt: There is some different research around maximum penalties. I think that would be a fascinating topic. I think the time is very ripe for a re-evaluation of the Criminal Code and to incorporate evidence-based policies.

We've seen the ability to have consecutive life sentences...or parole and eligibility periods. I am confident in our judiciary that if there's a competent, well-funded defence counsel, competent crown attorneys, the adversarial system and judicial discretion will impose the correct result. I don't think we need maximums and minimums to tell judges what that result should be.

● (1220)

Ms. Kerry-Lynne D. Findlay: In other words, from your point of view, judicial discretion is something that should be the way we measure sentencing, not minimums or maximums set by Parliament.

Is that where you're coming from?

Mr. Michael Spratt: Yes. Quite simply, a number written down in a book, or as the U.S. does, on a sentencing chart.... It's very easy sometimes to be a defence lawyer in the U.S., because you do the checklists on the chart and it gives you a range. It doesn't represent the reality of what we all know the human experience to be, that every situation is different and every person is different.

I think judges exercising their judicial discretion in the framework of our system are in the best place to impose a sentence and don't need maximums and minimums to box them in on that.

Ms. Kerry-Lynne D. Findlay: You mentioned south of the border and you brought up the U.S. again. Would you not agree with me that often—it's my understanding—in the United States the kinds of minimums we see are much higher than the ones we contemplate in the Criminal Code, the ones we already have? A minimum sentence, for instance, for an offence like this in some states is 20 years.

Mr. Michael Spratt: They've chosen different numbers, but that's precisely the point, isn't it? It's a number that's just been chosen and it doesn't accord with the principles of our system. Regardless of what that number is, whether that number was one year or 10 years, why not? The point is that it's not evidence-based policy.

Ms. Kerry-Lynne D. Findlay: You've used the word “evidence”. I think by “evidence” you mean criminology-type studies and things like that. In other words, research is what you mean by evidence, right?

Mr. Michael Spratt: Yes.

Ms. Kerry-Lynne D. Findlay: A lot of that research has been done looking at the American experience as the comparative. When you look at the American experience and see that a lot of the minimums they're talking about—and I just gave one example—are so much higher than what we're even talking about in Canada, it seems obvious to me that it's going to skew the result of those studies.

You cannot take a different system—even though it's adversarial-based, it's a very different system—a very different approach in the United States and say this will happen in Canada.

Mr. Michael Spratt: But isn't that the point?

When we look at studies in the United States that say that a 20-year minimum sentence doesn't deter, that's very applicable. If a 20-year minimum sentence doesn't deter, where is the evidence that a 5-year minimum sentence will deter?

It's very easy to impose minimum sentences. It's very easy to denounce conduct. I guess that's what minimum sentences are good for; they're good for denouncing, saying we think it's bad. We already do that through legislation. But minimum sentences don't assist with rehabilitation, and they don't assist with deterrence.

When it's the government's stated objective that this bill will help to protect children, that's wrong.

Ms. Kerry-Lynne D. Findlay: With respect, that's your opinion based on studies you've looked at. You're talking about studies, to a certain extent, done in a vacuum. In this bill we're talking about the proposal of a new minimum that hasn't been tested. We would be making new law here.

It's also my understanding that in the United States each state has the ability to pass these kinds of laws. You don't have the same kind of national consistency we aim for in Canada by having a national Criminal Code. Isn't that correct?

The Chair: Thank you. Our time is up.

Mr. Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Thank you, Mr. Chair.

My question is for Mr. Spratt. One of the potential challenges with interpreting the new provision is that the term "person" used in section 279 in the English version of the Criminal Code can refer to both the accused and the victim. We could actually infer that the new provision applies only to accused under the age of 16, not when the victim is under 16.

In your view, should we amend the provision to avoid any confusion in the English version, to talk about the kidnapped person as the victim by writing the provision as follows:

● (1225)

[*English*]

"Every one commits an offence who",

[*Translation*]

as under sections 253, 264.1 and 270 of the Criminal Code?

Lastly, would mandatory minimum sentences apply to young offenders? Could you explain that?

[*English*]

Mr. Michael Spratt: Yes. Obviously the intent of this legislation is to apply when the victim of the kidnapping is under the age of 16. It would be illogical for it to apply to the accused person, because of course mandatory minimum sentences don't have any applicability under the YCJA.

Interestingly enough, one of the reasons they don't have applicability under the YCJA is because there are very good studies about deterrence of young people, their thought process, and their rehabilitation.

I agree with you that this should be clarified. It wouldn't apply to young people for many of the same reasons I've articulated—the lack of evidence about the applicability here. So, yes, I would agree that should be clarified.

[*Translation*]

Mr. Pierre Jacob: Thank you, Mr. Chair.

I am going to share my time with Raymond Côté.

Mr. Raymond Côté (Beauport—Limoilou, NDP): Very well. Thank you very much.

Thank you to the witnesses for being here.

Let's talk about deterrence. If I am not mistaken, that is one of the objectives of the bill. Let me tell you that deterrence was important to the witnesses we were able to hear from. They truly believed that a minimum sentence has a deterrent effect. You have already said that, in various circumstances, in other countries or situations, it has been proven that it does not have a deterrent effect. That seems to be very clear.

In addition, Michel Surprenant came here two weeks ago. He is the vice-president of the Association of the Families of Persons Assassinated or Disappeared. A great deal of his testimony and examples focused on sexual predators who might kidnap children. We can imagine that those would be among the many cases that fall under this section. Mr. Surprenant was convinced of what he was saying and he seemed to rely on studies according to which those sexual predators followed their instinct, first and foremost. They were not necessarily thinking about the crime, although he described them as being clever in capturing their prey.

In this case, once again, I think minimum sentences would have no effect whatsoever, no deterrent effect.

[*English*]

Mr. Michael Spratt: That would accord with the information and the studies that I've seen, and also my experience with my own client base and with the criminal justice system in general. Most people who interact with the justice system are interacting because they don't have very good foresight. They aren't able to engage in a cost-benefit calculation, and especially in sexually based offences, of course, these people have a very complex and individualized background, with addiction, with mental illness, and deterrence plays a very little role when you're looking at those types of offenders.

[*Translation*]

Mr. Raymond Côté: I asked Chief Freeman a question about that. Clearly, that has less to do with rewriting the sections in the Criminal Code than with implementing measures that would prevent kidnapping cases. Educating the public, coordinating police forces, setting up alert systems, such as the AMBER alert program, might prevent those kidnapping cases. Those measures would have a stronger deterrent effect. What do you think about that?

● (1230)

[*English*]

Mr. Michael Spratt: I don't know if those would have a higher deterrent effect specifically, but I think they would be much more useful in terms of policy. The Amber alert system helps apprehend and disseminate information and get the children back, a very good policy. And of course especially from my vantage point as a practitioner, money spent on rehabilitation.... In Ottawa, we're very lucky to have the Royal Ottawa Hospital, which is one of the pre-eminent psychiatric facilities, and we have St. Lawrence Valley close by. Money is much better spent in places like that, I think.

I think, quite frankly, the government can communicate a message of denunciation, an abhorrence of this type of action without mandatory minimum sentences. I think citizens are able to understand that you can denounce conduct without thumping your fist on a table and blowing into the wind. An educated public will see other measures are more useful. Just because there isn't a mandatory minimum sentence doesn't mean that this conduct is approved of and accepted.

The Chair: Thank you.

Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): Thank you, Mr. Chair.

Mr. Spratt, you made a number of comments today that I found interesting. When you were questioned on whether an MMP is constitutional on first-degree murder, you said it's constitutional, but whether or not it's good policy is something else. I take it your position is that there shouldn't be a mandatory minimum penalty for first-degree murder.

Mr. Michael Spratt: Yes. I mean....

Mr. Kyle Seeback: Yes, there shouldn't be an MMP?

Mr. Michael Spratt: Yes.

Mr. Kyle Seeback: Okay. So—

Mr. Michael Spratt: From a policy perspective, no.

Mr. Kyle Seeback: Right, so would it be fair to say that you can't think of any circumstance where an MMP is appropriate? You don't think there should be any MMPs.

Mr. Michael Spratt: That's right.

Mr. Kyle Seeback: So no matter what crime, there should not be a mandatory minimum penalty.

Mr. Michael Spratt: Yes. It doesn't mean that I don't think there should be very harsh and severe penalties for certain crimes.

Mr. Kyle Seeback: You seem to also suggest that there shouldn't be maximum penalties either.

Mr. Michael Spratt: The logic would flow that there shouldn't be maximum penalties either.

Mr. Kyle Seeback: So you don't believe Parliament should give any guidance to the courts on sentencing; it should be a complete judicial discretion.

Mr. Michael Spratt: Oh no, Parliament gives many forms of guidance on sentencing. Let's just look at—

Mr. Kyle Seeback: If you don't put a minimum or a maximum, what guidance is Parliament giving to the judiciary on sentences?

Mr. Michael Spratt: Well, there are the principles of sentencing in the Criminal Code. There are aggravating and mitigating factors that judges can be directed to look at. Those are the types of useful guidance....

Mr. Kyle Seeback: Okay. People who come to this committee to oppose MMPs routinely say that these things do not deter. I take it that's your position as well, that MMPs don't constitute deterrence.

Mr. Michael Spratt: Yes. Of course, being a criminal practitioner, I haven't done the studies myself—

Mr. Kyle Seeback: Right, but—

Mr. Michael Spratt: —but from what I've read, yes, that's right.

Mr. Kyle Seeback: But you do recognize that there are two types of deterrence, right? There are general deterrents, which is what you're talking about in saying that the public won't in general be deterred by an MMP, but there are also specific deterrents, correct?

Mr. Michael Spratt: Yes.

Mr. Kyle Seeback: So when this person is in jail for a minimum of five years and cannot reoffend, they are specifically deterred from committing crimes against children.

Mr. Michael Spratt: Well, they are prevented from committing further crimes—

Mr. Kyle Seeback: Right. So they're specifically deterred....

Mr. Michael Spratt: Well, no, they're prevented from committing certain crimes, but it's interesting to look at: do lengthy periods of incarceration lead to less recidivism—

Mr. Kyle Seeback: Well, that's a completely different argument—

Mr. Michael Spratt: It's not really, is it?

Mr. Kyle Seeback: It's semantics, what you're saying...you're saying that the person is incarcerated so they can't commit a crime. You call it incarceration and I call it deterrence, but it's the same thing. They're not going to be out in the general public reoffending for that term.

Mr. Michael Spratt: It's not semantics. They're not being deterred from reoffending; they're being prevented from reoffending. There's a very big difference between the two.

Mr. Kyle Seeback: You say “tomato” and I say “tomahto”.

Mr. Michael Spratt: I usually say “tomahto”, actually.

Mr. Kyle Seeback: I'm going to share my time with Ms. James.

Ms. Roxanne James (Scarborough Centre, CPC): Thank you.

I have some questions in regard to the whole issue of deterrence. It's very clear that you do not believe that mandatory minimum sentences actually deter offenders from committing the crime, so—

Mr. Michael Spratt: I'm open to being convinced, though. I just haven't seen anything. I haven't been presented with that yet—

Ms. Roxanne James: —I'm just going to ask you a very simple question. Do you believe that lighter sentences would deter an offender from committing a crime?

Mr. Michael Spratt: No, they wouldn't.

Ms. Roxanne James: Okay. So would any sentence that you impose upon a convicted criminal...? Would any sentence deter someone from committing a crime?

● (1235)

Mr. Michael Spratt: The studies aren't so broad as to look at any sentence deterring a crime. I think there certainly is some deterrence to be found in sentences, but the proponents of the research that I've seen...and I would really suggest that this committee hear from Anthony Doob and others who have done the research themselves.

But the research I have seen has shown that it's not the severity of punishment that deters; it's likelihood of apprehension. So it doesn't matter whether you get a day or five days. What deters more is, will you be caught?

Ms. Roxanne James: So just going along the lines of the same question, you actually stated that in most cases of kidnapping a child —or I guess kidnapping for any matter—the sentences that are handed down are vastly "appropriate". So let me ask you about the sentences that are not appropriate.

How do we as a government protect society? How do we as a government protect the children on our Canadian soil? How do we protect them if we as parliamentarians cannot dictate what minimum and mandatory sentences should be?

I have a real problem: without setting mandatory minimums or maximum minimums in our Criminal Code and our judicial system, what we're saying is that it is up to the judges to determine what the sentence should be, regardless of whether it's murder or someone lifting a chocolate bar off a shelf. So we're leaving the discretion completely to someone who is a single person sitting in our courts making that decision, and I think the Canadian public, on hearing that, would have a real problem with that.

So let me ask you this question—

The Chair: Very briefly.

Ms. Roxanne James: Yes.

If it's not the government that can set mandatory minimums and mandatory sentences and minimum sentences and it's left to the judges, how do we protect society from judges who decide that the same offence should be applied to someone who lifts a chocolate bar and to someone who commits murder? Let me ask that question.

Mr. Michael Spratt: Well, I won't address the logical fallacy in that comparison, but what I will say is that the government does give direction. There are principles of sentencing. There are aggravating and mitigating features. There's a right of appeal.

Ms. Roxanne James: But there's a defined set and you can give a conviction. Obviously, somewhere along the line there has to be someone who sets the minimum and the maximum of what that sentence can be.

The Chair: Sorry, we're way over time.

Ms. Roxanne James: Thank you very much.

The Chair: I had initially set this to end at 12:30 because we have some committee business. We will end at this point. I want to thank Mr. Spratt for being here today.

We will stand down for a couple of minutes and then we will deal with our committee business.

Thank you.

● (1235)

(Pause)

● (1240)

The Chair: We will call the meeting back to order for just a few minutes to deal with the budget. A budget has been distributed by the clerk, and I need a motion to accept the budget. I think we have one bill that's very close.

It is moved by Mr. Goguen. All those in favour?

(Motion agreed to [See *Minutes of Proceedings*])

The Chair: We will suspend for 30 seconds or less to switch over to in camera for our agenda.

[*Proceedings continue in camera*]

Published under the authority of the Speaker of the House of Commons

SPEAKER'S PERMISSION

Additional copies may be obtained from: Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario K1A 0S5
Telephone: 613-941-5995 or 1-800-635-7943
Fax: 613-954-5779 or 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Also available on the Parliament of Canada Web Site at the following address: http://www.parl.gc.ca

Publié en conformité de l'autorité du Président de la Chambre des communes

PERMISSION DU PRÉSIDENT

On peut obtenir des copies supplémentaires en écrivant à : Les Éditions et Services de dépôt
Travaux publics et Services gouvernementaux Canada
Ottawa (Ontario) K1A 0S5
Téléphone : 613-941-5995 ou 1-800-635-7943
Télécopieur : 613-954-5779 ou 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante : http://www.parl.gc.ca